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Supreme Court, U. S.

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IN THE

MICHAEL RUDAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-406

**NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS.**

Petitioner.

v.

FEDERAL COMMUNICATIONS COMMISSION, et al..
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PAUL RODGERS

General Counsel

CHARLES A. SCHNEIDER

Assistant General Counsel

WILLIAM R. NUSBAUM

Deputy Assistant General Counsel

National Association of Regulatory

Utility Commissioners

1102 ICC Building

Post Office Box 684

Washington, D.C. 20044

Counsel for Petitioner

September 19, 1977

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**PETITION FOR A WRIT OF CERTIORARI TO
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Petitioner, the National Association of Regulatory Utility Commissioners, respectfully prays that a writ of certiorari be issued to review the judgement and opinion of the United States Court of Appeals for the District of Columbia Circuit entered on June 20, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals, which has not yet been generally reported appears at Appendix A to this petition. The Court of Appeals affirmed, by a 2 to 1 vote, the Memorandum Opinion and Order of the Federal Communications Commission (FCC), which is reported at 56 FCC 2d 14 (1975) and appears at Appendix B¹.

¹Petitioner NARUC has joined with petitioner California Public Utilities Commission in preparing a Joint Appendix which has been separately bound in a companion volume, hereinafter cited as "App."

JURISDICTION

The judgement of the Court of Appeals was entered on June 20, 1977. This petition is filed less than 90 days from that date pursuant to Supreme Court Rule 22. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the FCC, in preempting valid State regulatory authority over intrastate FX services, has met the Supreme Court's high standards necessary for Federal intervention into intrastate affairs.
2. Whether the FCC's preemption of intrastate services violates the specific Congressional mandate delineated in Section 2(b) of the Communications Act [47 U.S.C. § 152(b)] that the FCC shall have no authority over intrastate charges or facilities.
3. Whether the FCC was arbitrary and capricious and abused its discretion by not allowing an evidentiary hearing on the basis that no facts were in dispute in this proceeding when the record clearly shows that a factual dispute was at issue.
4. Whether the impact of the FCC's order was to fix intrastate rates at interstate levels thus necessitating an evidentiary hearing and denial of such hearing was arbitrary, capricious and an abuse of discretion.
5. Whether the FCC's order is contrary to the public interest in that it forces ordinary telephone subscribers to subsidize users of SPCC's specialized services.

STATUTORY PROVISIONS INVOLVED

1. Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.* (1970).
2. Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1970).

Relevant sections of the statutes are set out in Appendix D.

STATEMENT OF THE CASE

In this case the NARUC challenges a major policy decision of the Federal Communications Commission (FCC) which has the effect of undermining effective economic regulation of intrastate communications expressly reserved to the States by the Communications Act of 1934, as amended, 47 U.S.C. § 151, *et seq.*

Southern Pacific Communications Company (SPCC) is a specialized common carrier authorized by the FCC to offer certain interstate common carrier services.² SPCC has also been authorized to offer certain intrastate services by the California Public Utilities Commission (CPUC).

On March 4, 1975, the CPUC entered an Interim Opinion (Decision No. 84167, See Appendix C) which granted SPCC a certificate of convenience and necessity

²The specialized communications common carrier (SCCC) is a relatively new class of communications carriers established by the FCC in order to provide specialized interstate services not provided by the established carriers and to promote competition in the provision of services already being offered. In addition to permitting entry of these new carriers, the FCC ordered the interconnection of SCC's facilities with the established carriers. *Specialized Common Carrier Services*, 29 FCC 2d 870, *aff'd. on reconsideration*, 31 FCC 2d 1106 (1971), *aff'd. Washington Utilities and Transportation Commission v. FCC*, 513 F 2d 1142 (9th Cir. 1975), *cert. denied. National Association of Regulatory Utility Commissioners v. FCC*, 423 U.S. 836 (1975).

allowing it to provide intrastate private line service³ between six California cities: Bakersfield, Fresno, Los Angeles, Merced, San Francisco and Stockton. The CPUC did not authorize intrastate service between San Diego and other points in California. The CPUC held that interim rates should be set which would minimize rate differentials between the Pacific Telephone and Telegraph Corporation (PT&T), California's Bell System affiliate, and SPCC and encourage SPCC to concentrate upon expanding its business by offering innovative services to its potential customers, rather than by stressing large differences in rates. The rates were set in this manner so that the average telephone user would not be forced to pay higher rates to make up the revenues the established common carriers would lose if wide rate disparities were permitted to exist.

In order to further reduce the risk that the average telephone customer would be forced to subsidize the specialized services, the CPUC prohibited any direct connection of private line circuits to the exchange network, including any connection similar to foreign exchange (FX)⁴ service. In addition, the CPUC also ordered that any tie line connections to private branch exchanges (PBXs; i.e. switchboards located at the customer's premises) by SPCC should be arranged to prevent through calls from being made to or from the exchange network at either or both ends of the tie line circuit [Decision No. 84167, App. C].

³In 47 C.F.R., Sec. 21.2, a "private line service" is defined as, "A service whereby facilities for communication between two or more designated points are set aside for the exclusive use or availability for use of a particular customer and authorized users during stated periods of time."

⁴Foreign exchange (FX) service is a special, distinct private line service. It is a service whereby a telephone subscriber located in one exchange area may obtain exchange telephone service in another exchange area as if his telephone were actually located in that other exchange. It thus enables a businessman located in one part of California,

(continued)

In direct contravention of the CPUC's order, SPCC subsequently requested PT&T to provide it with the connections and facilities necessary for SPCC to establish the prohibited FX service to San Diego. PT&T was requested to connect an SPCC San Diego-Los Angeles private line to PT&T's San Diego exchange network and to connect SPCC's Los Angeles line to PT&T's Common Control Switching Arrangement (CCSA)⁵ to allow interconnection to American Airlines' nation-wide private line communication system. This American Airlines system, provided by PT&T and AT&T, stretches across the United States and connects a number of American Airlines offices, including offices in Los Angeles. Prior to SPCC's request for interconnection, SPCC maintained private line telephone facilities from San

⁴(continued)

or another State, to maintain a local telephone in another part of California or another State. Under FX, for example, a businessman located in Los Angeles can have, in effect, a local telephone in San Diego by paying a foreign exchange mileage charge between Los Angeles and San Diego. Thus a local exchange caller in San Diego can dial a local San Diego exchange number, the particular FX number granted to the customer, and reach the businessman in Los Angeles. Conversely, the same Los Angeles businessman can call San Diego telephone subscribers as if he were located in San Diego. (This service is effectuated through a local loop in Los Angeles, a Los Angeles-San Diego interexchange private line and business exchange service.) However, San Diego telephone subscribers could not reach Los Angeles other than the Los Angeles businessman over FX private line service. *FX service, in California, has been considered to be a substitute for toll telephone service, i.e. a substitute for intrastate long distance station service. Connection of a circuit in a telephone exchange other than the subscriber's local exchange historically has been regulated in California as FX service.* (See California Railroad Commission Decision 14420, Case 2026 (1924), 25 CRC 721, App. E)

⁵A CCSA is a private line system for linking the various offices of a large company through large switches on a local telephone company's premises instead of through PBX switch on the customer's premises. The private line circuits furnished in a CCSA are provided for the exclusive use of the CCSA customers. However, the switching machines are shared with other private line service customers.

Diego to Los Angeles which were *not* connected to the American Airlines network, nor did they connect to PT&T's local telephone exchange in San Diego. Through interconnection with the PT&T facilities, however, SPCC could provide American Airlines San Diego FX service, which could be accessed from any telephone on the American Airlines network, including Los Angeles and other points in California. In effect, this interconnection enables SPCC not only to carry interstate communications from points on the CCSA network outside of California to the San Diego exchange, but also to provide intrastate FX service from points on the CCSA network within California to the San Diego exchange. (See "Schematic of Connections Requested by SPCC"-App. F.)

PT&T supplied the facilities and connections requested by SPCC under protest and promptly filed a complaint with the CPUC requesting instructions on how to proceed considering that the requested facilities and connections were prohibited.

Without waiting for the lawfully instituted State procedures to take their course, and even though PT&T provided the requested facilities and connections, SPCC nevertheless petitioned the FCC on June 16, 1975, for "Declaratory Rulings." SPCC asked the FCC to declare that the Commission has primacy in authority over the interconnection by specialized carriers into the local exchange facilities for the purpose of furnishing FX service and CCSA. In effect, SPCC was asking the FCC to preempt valid, Congressionally mandated State authority over intrastate services whenever such services had both intrastate and interstate capabilities.

Several parties, including the NARUC, the CPUC, PT&T, and others, filed comments with the Commission in opposition to any declaratory ruling. In its comments the NARUC requested a full evidentiary hearing before the Federal-State Board pursuant to the Communications Act,

47 U.S.C. § 410(c). The parties in opposition stated that many factual issues were in dispute in the instant case. However, on October 9, 1975, the FCC issued a Memorandum Opinion and Order granting, in effect, the relief sought by SPCC (App. B). This order was based solely on the SPCC petition and the submitted comments opposing a declaratory ruling. No evidentiary hearing or other formal or informal fact finding procedure was at any time employed by the FCC.

In its decision, the FCC found that although the facilities in question would be used for both interstate and intrastate services, "it was technically and practically difficult to 'split' " the facilities between interstate and intrastate transmission functions. 56 FCC 2d at 19, App. B. Perceiving the problem in this case as an all or nothing situation, the FCC ignored the dual regulatory structure established by the Communications Act, and ruled that the services in question had to be interstate or intrastate; if interstate, even if also used for intrastate traffic, the services would thus be subject to FCC regulations.

The Commission recognized that the facilities involved were located entirely within California, but dismissed this fact as being irrelevant. Instead, the FCC found that the "key issue in determining this question . . . [whether the "lines" are interstate or intrastate] is the nature of the communications which pass through the facilities, not the physical location of the lines." 56 FCC 2d at 21, App. B. The Commission concluded that the SPCC facilities "are an integral part of a dedicated interstate communications network", and, therefore, interstate and within FCC jurisdiction. 56 FCC 2d at 21, App. B.

On this basis, with no evidentiary record before it, the Commission held that PT&T must continue to provide SPCC with interconnection facilities into the local exchange networks. Thus the rates to be charged for these services

were to be at the lower interstate level as approved by the FCC, rather than the higher CPUC approved rates.

The Court of Appeals for the District of Columbia Circuit affirmed the FCC Order by a two-to-one vote. The majority agreed with the Commission's conclusion that it would be impractical to segregate interstate from intrastate FX service and that such impracticality allowed the FCC to regulate any facilities used in both interstate and intrastate communications. The Court found that Commission jurisdiction was present because the "facilities are an integral part of a dedicated interstate communications network." (Decision of Court of Appeals, App. A.) Basically, the majority, in a very short opinion, quoted the decision of the FCC as its rationale for affirmance.

In a well-reasoned dissent Judge Robinson stated that the Communications Act specifically established a dual regulatory system for the regulation of telecommunications. He continued stating that the delicate balance envisaged by the Congress could swing in favor of FCC preemption only when the conflict between the exercise of Federal and State power is "unavoidable" (Decision of Court of Appeals, App. A) citing *North Carolina Utils. Comm'n v. FCC*, 537 F.2d 787, 792 (1976), *aff'g Telerent Leasing Corp.*, 45 FCC 2d 304 (1974). Judge Robinson concluded that the Commission's finding of inseparability of the facilities involved "comes up substantively short and . . . is unsupported by the evidence." (Decision of the Court of Appeals, App. A.) Thus Judge Robinson found that there was no evidence in this case allowing FCC preemption of valid State regulatory functions.

REASONS FOR GRANTING CERTIORARI

By itself, the FCC's decision to fundamentally alter the structure by which communications services are delivered to the American people raises important issues of public policy which warrant plenary review by this Court. The preemption policy adopted by the FCC, and the aftermath of its implementation, unquestionably will affect every American who utilizes telephone service.

Specifically, however, the Commission's decision to preempt State jurisdiction over all physically intrastate FX services and facilities which, by reason of switching arrangements, also have a capacity for interstate communications, is in direct conflict with this Court's many decisions on the respective jurisdiction of Federal agencies and State regulatory bodies. It is well established that Federal preemption of State authority is a power that must be exercised only where clearly warranted by the facts and the relevant statutes. *Head v. New Mexico Board of Examiners*, 374 U.S. 424, 10 L. Ed. 2d 983, 83 S. Ct. 1759 (1963); *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963). It is also settled that for valid Federal intervention into intrastate affairs to occur, justification for such intervention must be definite and apparent. *North Carolina v. U.S.*, 325 U.S. 507, 89 L. Ed. 1760, 65 S. Ct. 1260 (1945).

The FCC's decision is in direct contravention of the specific mandates of Congress that there should be a dual regulatory structure in the regulation of telecommunications. Section 2(b) of the Communications Act, 47 U.S.C. § 152(b), explicitly states that the Commission shall have no authority over intrastate services and facilities.

This Honorable Court should also review the decision because of the arbitrary and capricious refusal of the FCC to grant a hearing and its refusal to accept evidence on the factual issues in dispute. If the Commission's decision

stands, a dangerous precedent will be set whereby an administrative agency may, in disregard of all protests by the involved parties, declare that "no fact is in dispute" and therefore no hearing will be held. Such a ruling directly contravenes the entire Constitutional scheme of due process.

Further, the FCC's arbitrary denial of the opportunity to present evidence in this proceeding is in direct conflict with historical precedents establishing the basic principal that FCC prescription of rates cannot be effectuated without a full evidentiary hearing, *AT&T v. FCC*, 487 F.2d 864 (1973). Because the direct effect of the FCC's order herein is to lower rates for private line users and raise rates of the ordinary telephone consumers, the FCC should have had a full evidentiary hearing on the important issues involved in this proceeding.

Finally, this Court should grant certiorari because of the effects the FCC's order will have on the California rate system and the ordinary telephone subscribers. The authorization granted to SPCC to offer intrastate FX service in only high density markets at low interstate rates will cause massive diversion of revenues from the public exchange network. The result of these diversions is that the ordinary home telephone user will have to pay more for his service to make up for the loss of support for the intrastate toll operations and to cover increased exchange costs. Such a result is contrary to the purpose of the Communications Act, is against the public interest, and was reached without any consideration of evidence of the impact upon the quality and cost of telephone service.

I. THE FCC HAS NOT MET THE HIGH STANDARDS NECESSARY TO PREEMPT STATE REGULATION OF INTRASTATE FACILITIES.

It is well-established that if State legislation or regulatory policy, is not in conflict with or repugnant to the Congressional scheme, the States are *not* preempted from regulating in those areas. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 13 L. Ed. 996 (1851); *TV Pix, Inc. v. Taylor*, 304 F. Supp. 459 (D. Nevada, 1968), *affd.* 396 U.S. 556, 24 L. Ed. 746, 90 S. Ct. 749 (1970).

In *Head v. New Mexico Board*, 374 U.S. 424, 10 L. Ed. 2d 983, 83 S.Ct. 1759 (1963), this Court, in discussing preemption under the Communications Act of 1934, stated (at 429-430):

In dealing with the contention that New Mexico's jurisdiction to regulate radio advertising has been preempted by the Federal Communications Act, we may begin by noting that the validity of this claim cannot be judged by reference to broad statements about the "comprehensive" nature of federal regulation under the Federal Communications Act. "[T]he 'question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the State, must be answered by a judgment upon the particular case'. Statements concerning the 'exclusive jurisdiction of Congress' beg the only controversial question: whether Congress intended to make its jurisdiction exclusive." *California v. Zook*, 366 U.S. 725, 731, 93 L. Ed. 1005, 1010, 69 S. Ct. 841. *Kelly v. Washington*, 302 U.S. 1, 10-13, 82 L. Ed. 3, 10, 12, 58 S. Ct. 87. In areas of the law not inherently requiring national uniformity, our decisions are clear in requiring that State

statutes, otherwise valid, must be upheld unless there is found "such actual conflict between the two schemes of regulation that both cannot stand in the same area, (or) evidence of a Congressional design to preempt the field." *Florida Avocado Growers v. Paul*, 373 U.S. 132, 141, 10 L. Ed. 2d 248, 256, 83 S. Ct. 1210 (Emphasis added.)

In the instant case it is clear that the FCC has not met the guidelines set out by this Court. There has been no showing by the Commission that continued regulation by State commissions of intrastate FX services would be incompatible with, constitute a burden on, or otherwise impede FCC regulation of interstate services. Instead, the FCC based its preemption on the unsupported grounds that the separation of intrastate and interstate service is "difficult" and thus State regulation must fall.

Such a standard was certainly not contemplated by the Congress in its grant of authority to the FCC, and this Court has never established such ineffectual tests for Federal preemption.

Even the Interstate Commerce Commission (ICC), which enjoys greater latitude in the intervention into intrastate affairs than the FCC, must make its justification for such intervention "definitely and clearly apparent." *North Carolina v. U.S.*, 325 U.S. 507, 511, 89 L. Ed. 1760, 1765, 66, 65 S. Ct. 1260 (1945); See also *Chicago, M., St. P & P. R. R. v. Illinois*, 355 U.S. 300, 306, 2 L. Ed. 2d 292, 298, 78 S. Ct. 304 (1958); *Utah Pub. Serv. Comm'n. v. U.S.*, 356 U.S. 421, 425, 2 L. Ed. 2d 886, 891, 78 S. Ct. 796, 799 (1958); *Florida v. U.S.*, 282 U.S. 194, 211-212, 75 L. Ed. 291, 302-303, 51 S. Ct. 119 (1931). The ICC must make "clear findings, supported by evidence of each element essential to the exercise of that power . . ." and those findings "must meet a 'high standard of certainty.'" *North Carolina v. U.S.*, *supra*, 325 U.S. at 511, 89 L. Ed. at 1765, 65 S. Ct. 1260 (1945); See also J. Robinson's dissent in the instant case, Decision of Court of Appeals, App. A.

Certainly, it cannot be presumed that the FCC must meet a lesser standard when it attempts to abrogate State regulatory authority. Such standard has not been met in this case.

II. THE INTERPRETATION OF THE COMMUNICATIONS ACT BY THE FCC AND THE COURT OF APPEALS IS ERRONEOUS AND IGNORES SPECIFIC LIMITATIONS ON THE FCC'S AUTHORITY.

Another reason why this Court should grant certiorari in this case concerns the basic errors by the Court below in its interpretation of the Communications Act. In its decision, the FCC, as affirmed by the Court of Appeals, concluded that it has exclusive jurisdiction over FX and CCSA services which are conducted over private line facilities that have the capacity to provide interstate communications. The NARUC submits that the FCC's preemption of State regulation in this case and its rationale for this action ignores the Congressional mandate in the Communications Act of 1934, to preserve State regulation of intrastate communications services. Section 2(b) of the Act [47 U.S.C. § 152(b)] states, in pertinent part:

. . . , *nothing* in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations *for or in connection with intrastate communication services* by wire or radio of any carrier . . . (Emphasis added.)

The language of the Act is clear and unambiguous. It absolutely forbids the FCC from regulating intrastate FX service or the facilities used to provide such services. Section 2(b) is, in effect, a Congressional order for the establishment of a dual regulatory framework in the regulation of telecommunications. Thus, the FCC lawfully has authority over interstate services, but lacks any power over intrastate

facilities. The Communications Act clearly calls for a split of authority and therefore, the FCC's assertion of exclusive authority must fail.

The FCC and the Court of Appeals, as justification for Commission preemption, cite Section 1 of the Communications Act, 47 U.S.C. § 151, for the proposition that the major purpose behind the Communications Act is to develop a "unified national communications service" and that such goals override any restrictive language in the Act.

Section 1 must be read in conjunction with other sections of the Communications Act specifically limiting FCC authority. [i.e. Section 2(b).] The general language of a statute usually does not apply to a matter specifically dealt with in another part of the same statute. *Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208, 76 L. Ed. 704, 708, 52 S. Ct. 322 (1932); *AT&T v. U.S.*, 487 F.2d 864, 877 note 26 (1973).

Further, it is important to note that the FCC has not been ordered to effectuate the policies of one section of the Communications Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. On many occasions, the full scope of Congressional purpose dictates the careful accommodation of one statutory plan to another and it is incumbent upon an administrative agency, to meet Congressional intent, to undertake this accommodation. *Southern Steamship Co. v. National Labor Relations Board*, 316 U.S. 31, 47, 86 L. Ed. 1246, 1259, 62 S. Ct. 886 (1942). The clear intent of Congress, in this regard, is to preclude FCC preemption of State authority over intrastate communications.⁶

⁶See Hearings on S.6 before the Senate Committee on Interstate Commerce, 71st Cong., 1st Sess. 2167-68 (1930); Hearings on H.R. 8301 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 136 (1934); S. Rep. No. 781, 73d Cong., 2d Sess. 3 (1934); Remarks of Senator Dill, 78 Cong. Rec. 8823 (May 15, 1934).

III. THE FCC'S REFUSAL TO GRANT AN EVIDENTIARY HEARING ON THE BASIS THAT "NO FACTS ARE IN DISPUTE" WAS ARBITRARY, CAPRICIOUS AND AN ABUSE OF DISCRETION.

In its decision, the FCC stated that, "Since the facts of this case are not in dispute, and no party has disagreed with SPCC's characterization of the capabilities of the facilities, a hearing is not required." 56 FCC 2d 18, App. B. Another reason given by the Commission for its refusal to grant a hearing was that the questions involved in this case are "legal determinations"; "legal questions of jurisdiction." 56 FCC 2d 18, 19, App. B. However, the issues in this case are not as clearcut as the FCC asserts. The jurisdictional question is whether total preemption is required or whether jurisdiction over the FX services may be feasibly allocated between the State and Federal regulatory commissions in accordance with prior practice. This question of great jurisdictional import was decided on the basis of facts that, in spite of FCC statements to the contrary were definitely not agreed upon by the parties in this proceeding.

The basis of the FCC's decision and the prime factor used by the Court of Appeals for affirmance of that decision, is the alleged *fact* that the facilities in question are "technically and practically difficult to 'split'." 56 FCC 2d 19, App. B; Decision Ct. App., App. A. Thus, the Commission and the Court of Appeals decided the jurisdictional issue not solely on the basis of an erroneous interpretation of the Communications Act, but also on the grounds that the interstate calls and the intrastate calls on the facilities in California were inseparable. This, on its face, is a factual dispute, contrary to the FCC's assertions.

The initial comments filed by the NARUC and the CPUC properly dealt only with the efficacy of the FCC deciding these very important issues in a summary proceeding. The parties in opposition raised the factual issue that the

facilities in question are indeed capable of being "split", and requested a proper forum in which to present supporting evidence. The NARUC and other parties specifically noted that there are several methods by which these facilities can be separated into intrastate and interstate components.⁷ One such method is through the use of call restrictors (a set of facilities used for interstate circuits need not also be used for interstate circuits). Another method could be to pro-rate the circuits in question by relative use of each circuit. However, the FCC, instead of recognizing the existence of a fundamental factual dispute, issued its summary opinion and preempted a field expressly reserved to the states.

It is well-established that "a finding without evidence is arbitrary and baseless." *Interstate Commerce Commission v. Louisville & N.R. Co.*, 227 U.S. 88, 91, 57 L. Ed. 431, 433, 33 S. Ct. 185 (1912). Specifically, it has been ruled that especially in reversing the historical role of Federal and State governments in their regulation of physically intrastate lines, summary procedures are inappropriate, and it becomes essential that agency conclusions be founded upon substantial evidence and essential findings. *Columbia Broadcasting System v. FCC*, 454 F.2d 1018, 1025, 1028 (D.C. Cir., 1971).

The NARUC recognizes the great latitude granted to Federal agencies in the exercise of their statutory functions. However, such latitude is not an open-ended grant of authority for the FCC to make findings by administrative fiat. "In administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing' . . ." *Morgan v. U.S.*, 304 U.S. 1, 14-15, 82 L. Ed. 1129, 1130, 58 S. Ct. 775 (1938).

⁷See NARUC Opposition to SPCC Petition, July 1975, Ct. of App. Jt. App., Vol. 2 p. 308; Comments of AT&T, Ct. of App. Jt. App., Vol. 1 p. 135; Comments of CPUC, Ct. of App. Jt. App., Vol. 2 p. 357.

It is submitted that neither the Communications Act, nor the regulations promulgated thereunder, have delineated when a hearing is necessary in a proceeding such as involved herein. However, the concept of fundamental fairness implicit in the Administrative Procedure Act, 5 U.S.C. §551 *et seq.*, requires a hearing in this case. Under 5 USC Sec. 554(e), a declaratory order is considered to be an adjudicatory proceeding. Generally speaking, adjudications require agency hearing.

**IV. THE IMPACT OF THE FCC'S ORDER IS TO FIX
INTRASTATE RATES AT INTERSTATE LEVELS.
WHICH REQUIRES AN EVIDENTIARY
HEARING.**

In its "Petition for Declaratory Rulings and For Enforcement of Cease and Desist Orders", SPCC referred to many sections of the Communications Act as authority for the FCC to act in this case. One such provision was 47 U.S.C. § 205. (For SPCC Petition, see Ct. of App. Jt. App. Vol. 1, p. 1).

Basically, Section 205 authorizes the Commission, if it is of the opinion that any "charge, classification, regulation, or practice" of any carrier is or will be in violation of the Communications Act, "to determine and prescribe what will be the just and reasonable charge . . . and what classification, regulation, or practice is or will be just, fair, and reasonable. . ." Such determination may be made only "after full opportunity for hearing" upon a complaint or under an order made by the Commission on its own initiative. (47 U.S.C. § 205(a); See App. D).

At its inception, the current proceeding was not characterized as a rate making case. No specific dollar amount tariffs were called into question. However, "the courts have held that it is the actual impact of agency action and not its form that is decisive in determining the nature of the find-

ings and the evidence that are required to support the action." *A.T.&T. Co. v. FCC*, 449 F.2d 439, 451, note 12 (1971); see also *A.T.&T. Co. v. FCC*, 487 F.2d 864, 874 (1973).

In the instant proceeding, as in the 1971 *A.T.&T.* case cited above, although the form of the Commission's order is directed at a particular practice, its *impact* is to fix or prescribe lower rates for a large group of private line customers who have not, prior to this order, had the advantage of such lower rates.

Prior to the FCC's unlawful preemption of State regulation of the intrastate communications, the rates for intrastate FX services were controlled by the CPUC. These rates were the product of a pervasive scheme of economic regulation designed to prevent the siphoning off of revenue support for the basic intrastate toll system. Under the FCC's order, lower rates are provided to large private line users of FX service since interstate private line rates are lower than intrastate. The rate disparity is aggravated as the large users are diverted to the interstate system, even for intrastate calls, removing all but the shorter hauls and less dense circuit sections from the intrastate rate base.

In the current proceeding, the connection of private line circuits to the exchange network bypasses the toll network resulting in the aforementioned loss of support for the toll operation. More seriously, however, this generates stimulated minutes of exchange use without paying the cost of such use. The net effect is to increase separated exchange costs and thereby increase the cost of exchange service to the ordinary citizen. Meanwhile, the users of SPCC's system pay the lower interstate rates, thus forcing direct subsidy by the ordinary users.

It is the NARUC's contention that when the FCC preempted State regulation of intrastate FX services, it was in ef-

fect prescribing rates. Further, it is submitted that such prescription of rates cannot be effectuated without a full evidentiary hearing. *A.T.&T. v. FCC, supra*, 487 F.2d 864, 874 (1973). Not only is a major jurisdictional question at issue here, but, in addition, the public interest in affordable rates for all users of the telecommunications system requires that all the pertinent facts and issues involved in this case are adequately and fairly presented. No consideration of these public interest issues appears in the FCC's decision or in the record below.

V. THE EFFECT OF THE FCC ORDER HEREIN IS
TO FORCE ORDINARY TELEPHONE SUB-
SCRIBERS TO SUBSIDIZE USERS OF SPCC'S
SPECIALIZED SERVICES IN CONTRAVENTION
OF THE PUBLIC INTEREST.

The NARUC is not opposed to competition in the telecommunications area, *per se*. It is conceivable that, in certain specific instances, competition within the communications industry is a necessary ingredient of a healthy and viable worldwide communications network. In its interim order in this case, the CPUC found that the general services to be offered by SPCC were in the public interest, a decision, which, in effect, is an endorsement of competition. The issue here is *not* that competition will result in lower-cost service. Rather, the issue is one of lower-cost service to a few users at the expense of all other users of the system.

One of the major problems involved in this case is the diversion of revenues from the established carriers which will result from institution of FX service by SPCC at low interstate rates and the subsequent harm to the public from such diversion.

In the usual private line system, the circuits terminate in switching equipment dedicated to the private line system.

SPCC's San Diego end terminates in the local public exchange providing San Diego exchange dial tone at the Los Angeles end of the SPCC circuit. Thus, the SPCC customers can in effect have long distance calls, within California, at a drastically lower rate than if such customers used the public, switched toll system paying the intrastate message unit and mileage charges that all other users of the public exchange network pay. In addition, SPCC only intends to offer these services in high density markets. Yet the FCC and the Court of Appeals failed to even look at the practical effects of the FCC's decision.

PT&T must serve all persons desiring telephone service. Thus, PT&T serves many high-cost-to-serve customers in areas out of the main business corridors. Because PT&T must serve high-density *and* low-density markets, rates are determined by a statewide averaging system. Elimination of statewide averaging of private line rates would shift the rate burden to different customers, primarily to the ordinary home subscribers. By permitting SPCC to offer intrastate FX service only on high-density routes and at low interstate rates, a substitution of private line service for message toll service occurs resulting in reduced toll revenues. One effect of this is a decrease in exchange earnings due to the reduction of exchange costs assigned to message toll service under existing separations procedures.

A further diversion of revenues occurs as private line messages are permitted to enter the public exchange system as local calls thus tying up public lines which would have been available had these private line customers used their own private line switching equipment.

In addition, exchange loss is increased even further due to message stimulation resulting from removal of time and distance charges on each message. This stimulated exchange use increases the costs of telephone plant equipment attributed to the exchange.

In effect, SPCC, with the blessings of the FCC and Court of Appeals, is engaging in a "cream-skimming" operation, skimming off revenue support for the intrastate toll and exchange systems. SPCC is lapping up the profits on favorable routes and eschewing high-cost-low-return service, as well as diverting millions of dollars from the existing carriers.* The result of these revenue diversions is that the ordinary home telephone user will have to pay more for his service to make up for the loss of support for the intrastate toll operations and to cover the increased exchange costs. The ordinary intrastate ratepayers are thus subsidizing specialized intrastate services they do not use and the users of SPCC's services are getting a free-ride. It is inimical to the public interest and to the purposes propounded in the Communications Act that such a result should be permitted without a thorough evidentiary analysis by the FCC.

*The record below reflects that telephone companies in California will suffer a fifteen-million-dollar annual revenue loss by reason of the FCC's order in this case. (See Ct. of App. Jt. App., Vol. 2, p. 247).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgement of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

PAUL RODGERS
General Counsel

CHARLES A. SCHNEIDER
Assistant General Counsel

WILLIAM R. NUSBAUM
Deputy Assistant General Counsel

National Association of Regulatory
Utility Commissioners
1102 ICC Building
Post Office Box 684
Washington, D.C. 20044

Counsel for Petitioner

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